STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee ,

v.

JOEZELL WILLIAMS II,

Defendant-Appellant.

Wayne County Circuit Court 02-4374

Supreme Court
Docket No. 128533

Court of Appeals
No. 246706

128533

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

Pursuant to October 14, 2005 Order for Oral Argument on Application

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JURISDICTIONAL STATEMENT

Both parties timely applied for leave to appeal following the Court of Appeals' decision. *People v. Joezell Williams*, 265 Mich App 68; 692 NW2d 722 (2005). On October 14, 2005 this Court ordered the filing of supplemental briefs and argument on the applications.

SUPPLEMENTAL QUESTIONS PRESENTED

(1) WHETHER *PEOPLE V. BIGELOW*, 229 MICH APP 218 (1998), WAS DECIDED CORRECTLY;

Defendant-Appellant answers "yes"

(2) WHETHER, IF THE RULE IN *BIGELOW* IS FOLLOWED, BUT THE FELONY MURDER CONVICTION IS REVERSED OR VACATED ON APPEAL OR IN HABEAS PROCEEDINGS, THERE ARE IMPORTANT REAL-WORLD CONSEQUENCES THAT FLOW FROM THE PRIOR VACATING OF THE PREDICATE FELONY UNDERLYING THE SUBJECT FELONY MURDER CONVICTION, AND

Defendant-Appellant answers "yes"

(3) IN PARTICULAR, WHETHER A PREVIOUSLY VACATED PREDICATE FELONY CAN BE "REVIVED IF THE FELONY MURDER CONVICTION IS REVERSED OR VACATED ON APPEAL OR IN HABEAS PROCEEDINGS.

Defendant-Appellant answers "yes"

STATEMENT OF FACTS

The background facts may be found in the applications previously-filed, and in the Court of Appeals' decision. 265 Mich App 68; 692 NW2d 722 (2005).

ARGUMENT

1. *People v. Bigelow*, 229 Mich. App 218 (1998) was correctly decided. Convictions for both first-degree premeditated murder and first-degree felony-murder resulting from the death of a single individual are violative of double jeopardy protections.

2. The *Bigelow* rule when applied allows for the real-world consequence of protecting the public interest by both punishing the guilty and maintaining the fundamental constitutional rights underlying our criminal justice system.

3. The previously-vacated predicate felony could be revived.

Standard of Review

Double jeopardy challenges are constitutional questions of law reviewed **de novo**. *People v. Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004); *People v. Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

Analysis

1. *People v. Bigelow*, 229 Mich. App 218 (1998) was correctly decided. Convictions for both first-degree premeditated murder and first-degree felony-murder resulting from the death of a single individual are violative of double jeopardy protections.

The Double Jeopardy Clauses of the Fifth Amendment and Const. 1963, art. 1 §15 protect against the governmental abuses of: (1) multiple prosecutions for the same offense after an acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *Ohio v. Johnson*, 467 US 493, 497, 498-499; 104 S Ct 2536; 81 L Ed 2d 425 (1984) (the protection against multiple punishments "is designed to ensure that the sentencing discretion of courts is confined to

the limits established by the legislature"); *North Carolina v. Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969); *Ex parte Lange*, 85 US 163; 18 Wall 163; 21 L Ed 872 (1874)(recognizing both double jeopardy and due process protections in the Fifth Amendment); *Nutt*, 469 Mich at 574; *People v. Sturgis*, 427 Mich 392, 398-399; 397 NW2d 783 (1986)(recognizing that the prohibition against multiple prosecutions preserve finality in judgments and guard against prosecutorial over-reaching).

The Double Jeopardy protections against multiple punishments are limitations upon the courts and prosecutor, and do not act as limitations upon the Legislature's power to define offenses and punishment. *People v. Robideau*, 419 Mich 458, 469, 485; 355 NW2d 592 (1984). The protections against multiple punishments prevent courts from imposing greater punishment than that intended by the Legislature for the specified offense(s), *Robideau*, 419 Mich at 469, 485; *Sturgis*, 427 Mich at 400; *Brown v. Ohio*, 432 US 161; 97 S Ct 2221; 53 L Ed 2d 187 (1977), and the question of whether punishments are "multiple" is, thus, one of legislative intent. *Missouri v. Hunter*, 459 US 359; 103 S Ct 673; 74 L Ed 2d 535 (1983); *Whalen v. United States*, 445 US 684, 688; 100 S Ct 1432; 63 L Ed 2d 715 (1980)(the multiple punishment issue "cannot be resolved without determining what punishments the Legislative Branch has authorized"); *Robideau*, 419 Mich at 470. Additionally, where there is any ambiguity in the legislative intent, traditionally the rule of lenity is applied. *Whalen*, 445 US at 694; *People v. Wilder*,

411 Mich 328, 343; 308 NW2d 112 (1981) ("To the extent that legislative intent is not entirely free of doubt, the doubt must be resolved in favor of lenity"); *Robideau*, 419 Mich at 488.

At first glance, the issue and inquiry may appear simple, but there is a long history of confusion, and contradictory and conflicting decisions, perhaps especially so in cases involving compound and predicate offenses, and what constitutes the "same offense." See *Nutt*, 469 Mich at 591, overruling the transaction-test of *People v. White*, 390 Mich 245 (1973).

As noted in *Robideau*, "[t]he Legislature rarely reveals its intentions with a specific statement." 419 Mich at 486-487; and see *People v. Calloway*, 469 Mich 448, 454; 671 NW2d 733 (2003, revised 2004)(Kelly, J., concurring). Accordingly, general principles of statutory construction have arisen in double jeopardy analysis. For example, the courts look to whether the prohibited conduct, or type of societal harm, "is violative of distinct social norms" and, if so, then the Legislature may have intended multiple punishments. If separate statutes prohibit essentially the same social harm, then multiple punishments likely were not intended and are not permitted. Additionally, the amount of punishment authorized for a specific violation may reflect legislative intent; "[w]here one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the Legislature did not intend punishment under both statues. The Legislature has taken punishment, and imposed it accordingly, instead of imposing dual convictions." *Robideau*, 419 Mich at 487-488. Additionally,

the *Blockburger* test, set-forth in *Blockburger v. United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is a rule of statutory construction which allowed a presumption that the Legislature did not intend multiple punishments under separate statutes where the "same offense" is involved, but allowed such a presumption of intended multiple punishments where each of the offenses requires proof of an element that the other does not. See *Whalen*, 445 US at 691-692; *People v. Wakeford*, 418 Mich 95, 110; 341 NW2d 68 (1983); *People v. Ford*, 262 Mich App 443, 448-449; 687 NW2d 119 (2004), lv den 471 Mich 958; 691 NW2d 453 (2005).

However, the Legislature certainly has the power to, and at times does, expressly exercise its power and reveal its intention concerning multiple punishments for offenses arising from one, or the same, transaction, as may be seen, for example, in the felony-firearm statute, MCL 750.227b (and see *Wayne County Prosecutor v. Recorder's Court Judge*, 406 Mich 374; 280 NW2d 793 (1979)); the carjacking statute, MCL 750.529a(3)("A sentence imposed for a violation of this section may be imposed to run consecutively to any other sentence imposed for a conviction that arises out of the same transaction"); the home invasion statute, MCL 750.110a(8)("The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction"), and (9) (Imposition of a penalty under this section does not bar imposition of a penalty under any other applicable law"); concerning controlled substances, MCL 333.7408 ("A penalty imposed for violation of this article is in addition

to, and not in lieu of, a civil or administrative penalty or sanction otherwise authorized by law"); and as relates to certain deaths arising out of the same criminal transaction, MCL 769.36(1):

> (1) A person may be charged with and convicted of any of the following for each death arising out of the same criminal transaction, and the court may order the terms of imprisonment to be served consecutively to each other:
> (a) Section 602a(5), 617(3), 625(4), or 904(4) of the Michigan vehicle code, 1949 PA 300, MCL 257.602a, 257.617, 257.625, and 257.904.
> (b) Section 317 or 321 of the Michigan penal code, 1931 PA 328, MCL 750.317 and 750.321, where death results from the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive, or section 479a(5) of the Michigan penal code, 1931 PA 328, MCL 750.479a.
> (c) Section 80176(4), 81134(7), or 82127(4) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.80176, 324.81134, and 324.82127.
> (d) Section 185(4) of the aeronautics code of the state of Michigan, 1945 PA 327, MCL 259.185.
> (e) Section 353(6) of the railroad code of 1993, 1993 PA 354, MCL 462.353.

The Legislature has not acted to allow for the duplication of convictions and punishments for both premeditated and felony first-degree murder where a single individual has been murdered. *Bigelow* was correctly decided.

The case of *Wilder*, involving felony-murder and the predicate armed robbery convictions, set-forth that separately punishing the predicate was violative of double jeopardy. In the almost twenty-five years since the decision in *Wilder*, the Legislature, although having amended the first-degree murder statue to include other predicate felonies, has declined to allow what the prosecution seeks: multiple punishments for this type of single offense.

Reviewing courts determine the appropriate "unit of prosecution" in a given case

when assessing double jeopardy claims. For example, in *Robideau*, this Court recognized that the unit of prosecution in criminal sexual conduct prosecutions is the act of penetration, so the "other felony" in the criminal sexual conduct prosecution was not subsumed. 419 Mich at 488. In robbery cases, however, the unit of prosecution is the individual robbed, so where there is a single victim and armed robbery is the predicate offense of a greater offense, the armed robbery will be found to have been subsumed into the greater offense. See *Robideau*, 419 Mich at 489; and see *People v. Davis*, 468 Mich 77, 80; 658 NW2d 800 (2003)(holding that although two people were in a car during a carjacking, there was properly only one offense of count of carjacking); *People v. Wilson*, 242 Mich App 350, 361; 619 NW2d 413 (2000)(no double jeopardy violation found for convictions and sentences of felony-murder and armed robbery, where the armed robbery was of a different individual); *Ford*, supra, 262 Mich App at 456 (holding that the units of prosecution are different for armed robbery and bank, safe and vault robbery, under MCL 750.531).

Focusing upon the appropriate unit of prosecution upholds the legislative intent and protects against the specific harms a statute is created to guard against. *Wilder* was correctly decided.

2. The *Bigelow* rule when applied allows for the real-world consequence of protecting the public interest by both punishing the guilty and maintaining the fundamental constitutional rights underlying our criminal justice system.

Bigelow provided a method to prevent against possible real-world harm, i.e., that a defendant may escape punishment or get a "free" crime, by upholding the prior panel's

ruling that the judgment of conviction and sentence should reflect one sentence of first-degree murder supported by two theories, specifically, premeditated murder and felony-murder. *Bigelow*, 229 Mich App at 220. The defendant was held accountable for the crime, i.e., first-degree murder, which he had committed. The *Bigelow* court also properly applied existing double jeopardy law by vacating the felony (armed robbery) underlying the felony-murder theory. *People v. Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

The societal interests involved in any criminal case include the protection of the accused's constitutional rights and the punishment of the guilty, in accordance with the specific statutory mandates established by the Legislature. In the event that a perpetrator would commit offenses against several victims in the course of criminal activity, for example, shooting a bystander and then proceeding to commit a robbery (as posited by Justice Corrigan in *People v. Curvan*, 473 Mich 896, 904; 703 NW2d 440 (2005)), prosecutions could follow as to each victim. The defendant might be prosecuted for both premeditated murder and felony murder, as alternate theories, as to the decedent, and armed robbery or other similar assault as to the store owner. *Wilson*, supra, for example; and see *Ford*, supra, 262 Mich App at 466, n 4 (White, P.J., concurring in part and dissenting in part) ("Presumably, the prosecutor could choose in such cases between multiple counts of armed robbery, if all the elements of that offense are present, or a single count of carjacking or bank robbery, if armed robbery cannot be established. The prosecutor could also charge under both statutes and seek a jury verdict on all counts,

leaving it to the court to enter the appropriate convictions after taking into account double jeopardy concerns").

There is no "free" crime.

3. The previously-vacated predicate felony could be revived.

In the event the felony-murder conviction subsequently were set-aside, for example, through the granting of a petition on federal habeas review (as posed as an hypothetical by Justice Corrigan in *Curvan*, 473 Mich at 905)[the granting of which presumably would only follow a defendant's inability to have the federal constitutional rights protected by the Michigan Court of Appeals and this Honorable Court], there would appear to be no double jeopardy bar against a prior conviction being "revived" or reinstated, as the prior basis for the double violation would have been removed. The predicate felony, which had presumably and necessarily been found by the fact-finder beyond a reasonable doubt, could therefore be revived.

It could be argued that none of the three protections, i.e., multiple prosecutions (both after acquittal and after conviction) and multiple punishments, traditionally recognized would be directly implicated. Generally, double jeopardy protections do not bar retrial following a successful appeal which reverses the conviction or sentence for error in the proceeding. See, for example, *North Carolina v. Pearce*, 395 US at 395 ("a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction"); and citing *United States v. Tateo*, 377 US

463, 465; 84 S Ct 1587; 12 L Ed 2d 448 (1964); and *Stroud v. United States*, 251 US 15 (1919), for the principle that retrial is not precluded where a conviction has been set-aside due to error in the proceeding; see, also, *Bryan v. United States*, 338 US 552 (1950)(retrial not barred after conviction reversed because of insufficient evidence); and *Forman v. United States*, 361 US 416 (1960) (retrial not barred after conviction reversed because of erroneous jury instruction). The Supreme Court in *Pearce* noted that the rationale underlying the "well-established part of our constitutional jurisprudence" [*Tateo*, 377 US at 465] allowing the government to retry a defendant whose conviction had been reversed due to error in the proceeding, "rests ultimately upon the premise that the original conviction has, at the defendant's behest, been wholly nullified and the slate wiped clean." 395 US at 721. Also, see, by analogy, *United States v. Dinitz*, 424 US 600, 607; 96 S Ct 1075; 47 L Ed 2d 267 (1976) ("a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error;" and *People v. Hicks*, 447 Mich 819, 859; 528 NW2d 136 (1994)(Boyle, J., dissenting in consolidated *Bellew* case)("When a defendant seeks the mistrial, "the central policy of the Double Jeopardy Clause—to protect defendants from government-instigated multiple prosecutions and sentences—is not implicated." *United States v Jamison*, 164 US App DC 300, 305; 505 F2d 407 (1974), cited with approval in *Dinitz*, 424 US 609").

CONCLUSION

Bigelow provided a method to prevent multiple punishments violative of double jeopardy, and to protect against possible real-world harm, i.e., that a defendant may escape punishment or get a "free" crime, by holding that where the death of a one individual is at issue, a conviction and sentence should may reflect one sentence of first-degree murder supported by two theories, specifically, premeditated murder and felony-murder. *Bigelow* was correctly decided.

Wilder, and subsequently *Robideau*, recognized that punishment for an underlying predicate offense, subsumed into the greater offense, is, absent clear legislative intent, violative of the Double Jeopardy Clauses. *Wilder* was correctly decided.

"To the extent that legislative intent is not entirely free of doubt, the doubt must be resolved in favor of lenity." *Robideau*, 419 Mich at 488.

RELIEF REQUESTED

WHEREFORE, Joezell Williams II respectfully requests this Honorable Court grant his application for leave to appeal.

Respectfully submitted,

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